

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSE M. MENCHACA,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
DA3443910426-I-1

DATE: MAR - 3 1993

Jose M. Menchaca, San Antonio, Texas, pro se.

Gilbert R. Reyes, San Antonio, Texas, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of the May 29, 1991, initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, the Board DISMISSES the appellant's petition for review as untimely filed.

BACKGROUND

In his initial decision, the administrative judge notified the appellant that the initial decision would become final on July 3, 1991, unless the appellant filed a petition

for review with the Clerk of the Board by that date. Initial Decision at 6. The initial decision further informed the appellant that this was an important date because it was the last day for filing a petition for review. *Id.*

The appellant filed a petition for review and a motion for waiver of time limit with the Clerk of the Board on November 10, 1992. Petition for Review (PFR) File, Tab 1. By a November 25, 1992, notice, the Clerk of the Board returned the petition and motion to the appellant, advising him that the petition was deficient because he failed to serve a copy of it on the opposing party and to include a certificate of service. *Id.*, Tab 2. The notice also advised the appellant that the petition appeared to be untimely filed and informed him that the Board's regulations, 5 C.F.R. § 1201.114(f), require that a late-filed petition for review must be accompanied by either an affidavit or a statement, signed under penalty of perjury, stating good cause for the late filing. The notice provided the appellant fifteen days from the date of the notice to file a perfected petition for review and a motion for waiver of the time limit with accompanying support.

The appellant refiled his petition and motion for waiver on December 9, 1992, which date was within the fifteen-day time period set by the Clerk.¹ PFR File, Tab 3. In a

¹ The appellant corrected the deficiencies by serving a copy of the refiled petition on the agency and including a certificate of service.

December 8, 1992, letter accompanying his refiled petition, the appellant asserted that he had good cause for late filing because he was confused by the fact that the initial decision was not issued by the administrative judge who had issued an earlier order, he was gathering new and material evidence, he was harassed by his supervisor after receiving the initial decision, and he was involved in an automobile accident on August 2, 1991. *See id.*

By notice dated December 24, 1992, the Clerk of the Board acknowledged receipt of the refiled petition and informed the appellant that the motion for waiver of time limit was deficient in that it did not include an affidavit or a sworn statement signed under penalty of perjury. *Id.*, Tab 4. The Clerk's notice informed the appellant that he would be allowed to file, within ten days from the date of the notice, an affidavit or signed statement conforming to the Board's regulation.

On January 2, 1993, the appellant submitted an unsworn statement, which was not in the form of an affidavit or statement signed under penalty of perjury, asserting good cause for late filing because the "mere difference of location of time, of something's [sic] being earlier or later, is not in itself a rational ground for having more or less regard for it," and "the different temporal position of the persons and generations does not in itself justify treating them differently." *Id.*, Tab 6. The appellant stated further that "the duty to comply with particular laws may be overridden in

situations where the collective judgment is sufficiently unjust" and compliance with a law or regulation arguably might injure future generations who are not parties to the dispute. *Id.* The agency has filed a motion contending, *inter alia*, that the petition should be dismissed as untimely. *Id.*, Tab 5.

ANALYSIS

A petition for review must be filed within thirty-five days after the issuance of the initial decision. 5 C.F.R. § 1201.114(d). We find that the appellant's petition for review, which was filed approximately seventeen months after the expiration of the filing deadline, was untimely.

The Board may waive the thirty-five-day time limit if the appellant shows good cause for the late filing. 5 C.F.R. §§ 1201.12, 1201.114(f). To establish good cause for an untimely filing, a party must show that he exercised diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). The showing must be presented in the form of an affidavit or statement signed under penalty of perjury. 5 C.F.R. § 1201.114(f); *Mack v. Office of Personnel Management*, 45 M.S.P.R. 472, 474 (1990).

The Clerk of the Board twice directed the appellant to show cause for the late filing in the form of an affidavit or statement signed under penalty of perjury. The appellant has not complied. Although he entitled his January 2, 1993, submission "Affidavit," it is neither an affidavit nor a

statement signed under penalty of perjury, as required by 5 C.F.R. § 1201.114(f). See *Headley v. Department of the Army*, 53 M.S.P.R. 660, 662 (1992). Likewise, his December 8, 1992, letter does not conform to the Board's regulation. Accordingly, the appellant's unverified allegations do not constitute good cause for his untimely filing. See *Quarles v. Department of Housing & Urban Development*, 47 M.S.P.R. 636, 638 (1991).

Even if we were to consider the appellant's general assertions in his January 2, 1993, submission that timeliness requirements are relative and should be ignored in the interest of justice, we would find that they do not establish good cause for the untimely filing of his petition for review. See *Mata v. Office of Personnel Management*, 53 M.S.P.R. 552 (appellant argued that ends of justice would be served by waiving time limit; petition for review dismissed), *aff'd*, No. 92-3418 (Fed. Cir. Nov. 20, 1992) (Table); *Headley v. Department of the Army*, 53 M.S.P.R. at 662 (appellant's unverified assertions that did not relate specifically to his petition for review were insufficient to show good cause).

Likewise, the statements made by the appellant in his December 8, 1992, letter, if considered, would not establish good cause for the late filing. In that letter, the appellant refers to allegedly "new and material" evidence consisting, in part, of the following personnel-related documents: (1) an April 3, 1991, notification that the agency had received his application for a Supervisor Mails and Delivery Relief

position; (2) a February 14, 1991, bulletin board posting showing non-bargaining selections for a Superintendent and three Supervisor positions; (3) a December 20, 1990, notice that the agency had received his application for a Superintendent position; (4) an August 9, 1990, notification that the agency had received his application for a Supervisor, Mails and Delivery Relief position; (5) an August 7, 1989, notice that the agency had received his application for a Supervisor position; and (6) copies of what appear to be portions of several undated statements of qualifications (PS Form 991) referencing Announcement No. 91-0034 for the position of Supervisor, Mails and Delivery (Relief).² See PFR File, Tab 3. The appellant has not shown that these six documents, five of which are dated before the record below closed and one of which is undated, were not readily available before the close of the record despite his due diligence. See *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). Accordingly, these documents would not have established good cause for the untimely filing of his petition for review. See *Blackburn v. U.S. Postal Service*, 54 M.S.P.R. 612, 614 (1992), *aff'd*, No. 92-3602 (Fed. Cir. Jan. 15, 1993) (Table).

The automobile accident that is referenced in one of the documents submitted with the petition for review occurred over

² A February 7, 1991, letter, which the appellant also included with the petition, regards the selection of an applicant other than the appellant for a Superintendent position. Because this letter is in the record below, it does not constitute new evidence. See Initial Appeal File, Tab 1 and Tab 5, Subtab 2.

a month after the time for filing the petition had lapsed. The appellant's assertions regarding this accident therefore do not show the existence of circumstances that prevented him from filing his petition prior to the expiration of the filing deadline.³ See *Walton v. U.S. Postal Service*, 54 M.S.P.R. 510, 512 (1992) (untimely filing not excused by assertions regarding flood that occurred twenty days after the filing deadline); *Carabeo v. Office of Personnel Management*, 52 M.S.P.R. 454, 456 (1992) (volcanic eruption taking place after the time given to the appellant by the Clerk of the Board to file a petition does not explain failure to file within allowed time).

The appellant's alleged confusion over the fact that the administrative judge who issued the acknowledgment order was not the administrative judge who issued the initial decision also would not constitute grounds for waiver, even if presented in an affidavit or statement signed under penalty of perjury. See *Estate of De Palermo v. Office of Personnel*

³ Among the documents the appellant sent with his petition for review is an August 27, 1992, letter from the Office of Personnel Management (OPM) responding to the appellant's request that OPM investigate his allegation that the Office of Workers' Compensation Programs and his agency have not accommodated the disabilities that apparently resulted from the August 1991 traffic accident. See PFR File, Tab 3. OPM advised the appellant that if he believes his agency has not properly considered him for reemployment, he may appeal to the Merit Systems Protection Board. Such an appeal, however, would need to be filed with the appropriate Board regional office. See 5 C.F.R. § 1201.22(a). We cannot consider any reemployment issues in this opinion, which is solely concerned with the appellant's petition for review of the May 29, 1991, initial decision.

Management, 53 M.S.P.R. 4, 6 (1992) (confusion as to Board administrative practices does not constitute good cause).⁴ Nor would good cause have been established by the appellant's vague reference to being harassed by his supervisor, particularly since the appellant does not contend that the alleged harassment took place during the thirty-five-day period for filing a petition for review or even that the alleged harassment was related to filing a petition for review. See *Herrmann v. U.S. Postal Service*, 29 M.S.P.R. 213, 215 (1985) (appellant's fear of retaliatory action by his supervisor does not constitute good cause to waive the regulatory time limit by more than two years).

We find no basis for waiving the filing deadline, and we dismiss the petition. See *Shiflett v. U.S. Postal Service*, 839 F.2d 669, 670-74 (Fed. Cir. 1988); *Alonzo*, 4 M.S.P.R. at 184.

⁴ In this connection, we note that, irrespective of which administrative judge issued the initial decision, the decision itself clearly stated that a petition seeking Board review must be filed with the Clerk of the Board and provided the appellant with the proper address for filing a petition and the correct deadline by which he should have done so. The appellant's alleged confusion as to the filing deadline was not caused by the initial decision, and he has not shown due diligence under the circumstances. See *St. Pierre v. U.S. Postal Service*, 55 M.S.P.R. 98, 101 (1992).

ORDER

This is the final order of the Merit Systems Protection Board concerning the timeliness of the appellant's petition for review. The initial decision will remain the final decision of the Board with regard to the merits of the appeal. 5 C.F.R. § 1201.113.

NOTICE TO APPELLANT

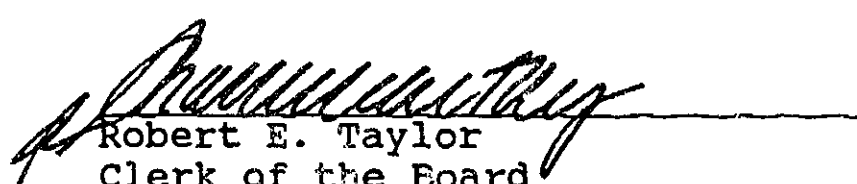
You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board